

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 28, 2002

IN RE:

DOCKET TO DETERMINE THE COMPLIANCE  
OF BELL SOUTH TELECOMMUNICATIONS,  
INC.'S OPERATIONS SUPPORT SYSTEMS  
WITH STATE AND FEDERAL REGULATIONS

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DOCKET NO.  
01-00362

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ORDER IMPOSING SANCTIONS AGAINST  
BELL SOUTH TELECOMMUNICATIONS, INC.  
PURSUANT TO TENN. CODE ANN. § 65-4-120

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This matter came before the Tennessee Regulatory Authority ("Authority" or "TRA") during a regularly scheduled Authority Conference held on June 11, 2002 for consideration of whether to impose sanctions upon BellSouth Telecommunications, Inc. ("BellSouth") for its failure to comply with the orders and rulings of this agency requiring BellSouth to respond to discovery, specifically to Interrogatory No. 36, which was propounded jointly by AT&T Communications of the South Central States ("AT&T"), TCG MidSouth, Inc. ("TCG"), and the Southeastern Competitive Carriers Association ("SECCA") on September 17, 2001.<sup>1</sup>

**Background**

Under the Federal Telecommunications Act of 1996 and Tennessee law,<sup>2</sup> Incumbent Local Exchange Companies ("ILECs"), such as BellSouth, must provide nondiscriminatory access to their operations support systems ("OSS") to Competing Local Exchange Carriers

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<sup>1</sup> Discovery matters before the TRA are guided by the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-101 *et seq.* and Tenn. Comp. R. & Reg. 1220-1-2 *et seq.*

<sup>2</sup> See 47 U.S.C. § 251(c)(3) and Tenn. Code Ann. § 65-4-124(a), respectively.

("CLECs").<sup>3</sup> This legislation reflects a recognition that absent nondiscriminatory access to an ILEC's OSS, CLECs cannot effectively compete with ILECs. Discriminatory access to an ILEC's OSS may delay or prevent CLECs from obtaining data necessary to sign up customers, placing an order for services or facilities with the ILEC, tracking the progress of that order to completion, receiving relevant billing information from the incumbent, or obtaining prompt repair and maintenance for the elements and services it obtains from the incumbent carrier.<sup>4</sup>

### **Procedural History**

At a regularly scheduled Authority Conference held on February 21, 2001, the Authority convened TRA Docket No. 01-00362 to explore whether CLECs operating in Tennessee have nondiscriminatory access to BellSouth's OSS. The Authority appointed Director H. Lynn Greer, Jr. to serve as the Pre-Hearing Officer for the purpose of developing an issues list, establishing a procedural schedule and resolving preliminary matters including discovery disputes.

The Pre-Hearing Officer scheduled a Pre-Hearing Conference to establish, with the participation of the parties, the issues and a procedural schedule. During this Pre-Hearing Conference, which was convened on September 6, 2001, the proceedings were bifurcated into two phases, with the focus of Phase I on the issue of the regionality of BellSouth's OSS.<sup>5</sup> A procedural schedule which included discovery and a hearing date for Phase I was established. The Phase I Hearing was set for the week of December 3, 2001.

Consistent with this procedural schedule, on September 17, 2001, AT&T, TCG, and

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<sup>3</sup> "[T]he term OSS refers to the computer systems, databases, and personnel that incumbent carriers rely upon to discharge many internal functions necessary to provide service to their customers." *In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, FCC Docket No. 98-72, CC Docket No. 98-56; 13 FCC Rcd. 12,817 (released April 17, 1998) (*Notice of Proposed Rulemaking*) ¶ 9 (hereinafter "*Notice of Proposed Rulemaking*").

<sup>4</sup> *Notice of Proposed Rulemaking*, ¶ 9.

<sup>5</sup> Phase II was to focus on (1) whether measurable "commercial usage" exists that will allow the Authority to determine if BellSouth is providing nondiscriminatory access to its OSS in Tennessee; (2) the degree of reliance that may be placed on the OSS testing conducted or being conducted in Florida and Georgia; and (3) what, if any, OSS testing is needed for BellSouth's Tennessee operations.

SECCA jointly propounded discovery requests to BellSouth, including Interrogatory No. 36, which stated:

From January 2001 to present, for each individual state in BellSouth's region and for the BellSouth region in total, please identify the achieved flow-through rate and the CLEC error excluded flow-through rate, by interface (*i.e.*, LENS, TAG, EDI and all interfaces) for the following categories: a) LNP; b) UNE; c) Business Resale; d) Residence Resale; and e) Total (*i.e.*, UNE, Business Resale, and Residential Resale combined).<sup>6</sup>

BellSouth filed *Objections to First Interrogatories and Request for Production of Documents of AT&T and SECCA* on September 24, 2001. This document did not include an objection to Interrogatory No. 36. Nevertheless, in its responses to interrogatories filed on October 12, 2001, BellSouth declined to provide the information requested in Interrogatory No. 36, stating that it "does not produce this data on flow-through rates on a per state basis." In an attachment to its response, BellSouth provided a file purporting to show "the achieved flow-through rate and the CLEC error excluded flow-through rate, by interface for the months of January 2001 through August 2001" on a regional basis. Nowhere in this discovery response did BellSouth object to Interrogatory No. 36 or raise an issue of technical infeasibility in responding to Interrogatory No. 36.

On November 2, 2001, AT&T and TCG filed *Procedural Motions of AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc.* This filing included the following motions: (1) Motion to Strike Testimony that is beyond the scope of Phase I; (2) Motion to Revise the Procedural Schedule; (3) Motion to Strike the PriceWaterhouseCoopers ("PWC") Attestation;<sup>7</sup> (4) Motion to Compel PWC to submit affidavits substantiating their

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<sup>6</sup> *In re Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*, TRA Docket No. 01-00362 (hereinafter "*OSS Docket*") (*AT&T Communications of the South Central States, TCG MidSouth, Inc. and the Southeastern Competitive Carriers Association, First Set of Interrogatories to BellSouth Telecommunications, Inc.*, p. 16).

<sup>7</sup> The document referred to as the PWC Attestation, is an attestation of the regionality of BellSouth's OSS by Robert L. Lattimore, a PWC accountant.

claims that documents produced during discovery qualify for confidential treatment; and (5) Motion to Compel BellSouth to fully respond to discovery requests. Among the responses to discovery requests that were purported to be incomplete was BellSouth's response to Interrogatory No. 36. In a chart attached to the Motion, AT&T and TCG provided the following comment:

BellSouth states that it *does not* produce flow-through data on a state-specific basis. According to KPMG, however, BellSouth is capable of producing such data. BellSouth, therefore, should either produce the data or explain why producing such data is not technically feasible.<sup>8</sup>

The Pre-Hearing Officer addressed the issue of BellSouth's failure to respond to Interrogatory No. 36 during the November 8, 2001 Pre-Hearing Conference. During the Pre-Hearing Conference, BellSouth did not clearly indicate whether the requested data existed or was available, representing only that it did not know whether the requested data could be extracted in the manner suggested by AT&T.<sup>9</sup> In response, AT&T asserted that a KPMG witness who worked on the flow-through evaluation in Georgia had testified that BellSouth had the capability to provide state-specific flow-through reports. In addition, AT&T stated that BellSouth's flow-through reports are a computer program that runs on a database containing flags to identify the state referenced, a fact that could assist in the retrieval of the information. AT&T explained that the requested information would either confirm or contradict the claim that BellSouth's ordering systems perform substantially the same from state to state for flow-through purposes.<sup>10</sup> In response, BellSouth reiterated that it did not produce flow-through reports on a state by state basis and was unsure whether it could.<sup>11</sup> After hearing considerable argument, the Pre-Hearing Officer ordered BellSouth to either produce the requested data in response to Interrogatory No.

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<sup>8</sup> OSS Docket (*Procedural Motions of AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc.*) (filed November 2, 2001) Attachment A, p. 1).

<sup>9</sup> OSS Docket (Transcript from November 8, 2001 Pre-Hearing Conference p. 61, 63-64).

<sup>10</sup> *Id.*, p. 56.

<sup>11</sup> *Id.*, pp. 54, 57.

36 or explain in writing no later than November 13, 2001 why producing such data is not technically feasible.<sup>12</sup>

BellSouth failed to comply with the Pre-Hearing Officer's discovery order from the November 8<sup>th</sup> Pre-Hearing Conference. On November 14, 2001, the Pre-Hearing Officer issued the *Order Resolving Procedural Motions*, which addressed the production of the flow-through data in response to Interrogatory No. 36 as follows:

Without a state specific flow-through report, it is impossible to determine if the performance from one or more states provides performance at a level sufficient to make up for any state that may not be performing well enough to meet satisfactory standards. This is particularly important when one considers the controversy surrounding Direct Order Entry (DOE) and Service Order Negotiation System (SONGS). According to BellSouth these systems have no material difference in functionality or reporting. This information could prove important in determining the regionality of BellSouth's OSS.

In addition, BellSouth produces state-specific reports on firm order confirmation ("FOC") timeliness and rejection notice timeliness which are further broken down

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<sup>12</sup> *Id.*, pp. 63-64. During the November 8<sup>th</sup> Pre-Hearing Conference, the Pre-Hearing Officer addressed BellSouth's lack of cooperation in other discovery matters in this proceeding. On October 22, 2001, BellSouth filed the Direct Testimony of Milton McElroy, Jr., BellSouth's Director of Interconnection Services, attached to which as exhibits were a Report on Georgia's OSS completed by KPMG and the PWC Attestation. The stated purpose of this testimony was to "provide this Authority with information about the Georgia and Florida OSS testing conducted by KPMG, along with that of regionality testing conducted by PriceWaterhouseCoopers." (*OSS Docket* (Direct Testimony of Milton McElroy, Jr. (October 22, 2001) p. 2)). Subsequently, BellSouth refused to make available for cross-examination the authors of the Report on Georgia's OSS completed by KPMG and the PWC Report and Attestation, notwithstanding Pre-Hearing Officer's repeated expressions of concern regarding the constitutional problems of presenting such evidence without permitting cross-examination of its authors. Transcript from November 6, 2001 Authority Conference, p. 12. In support of its position, BellSouth argued that it did not control these nonparty witnesses. (*OSS Docket* (BellSouth Response to Motion for Summary Finding) (October 29, 2001) p. 5; see Transcript from September 6, 2001 Pre-Hearing Conference, p. 63; Transcript from October 9, 2001 Pre-Hearing Conference, p. 47; Transcript from November 8, 2001 Pre-Hearing Conference, p. 11, 17-18, 68). During the November 8<sup>th</sup> Pre-Hearing Conference, the Pre-Hearing Officer excluded this evidence on due process grounds. (*OSS Docket* (Order Resolving Procedural Motions) (November 14, 2001) pp. 24-25). In a *Motion for Reconsideration*, BellSouth asserted that the witnesses had become available, and the Pre-Hearing Officer subsequently rescinded the ruling at BellSouth's request. (*OSS Docket* (Order Granting Motion for Reconsideration) (November 27, 2001) p. 4). During the Hearing, it became evident through their testimony that both the KPMG witness Michael Weeks and the PWC witness Mr. Lattimore were and had been willing all along to be available as witnesses for BellSouth. (*OSS Docket*, Transcript of December 3, 2001 Hearing, p. 48). In addition, during the Hearing, BellSouth's counsel entered an appearance on behalf of and represented Mr. Lattimore during his testimony. (See *OSS Docket*, Transcript of December 5, 2001 Hearing, pp. 3-6); see also (The CLECs' *Phase I Post-Hearing Brief*) (filed March 1, 2002) p. 35.

BellSouth also failed to file by November 13, 2001 affidavits explaining why the documents it filed as proprietary should be classified as proprietary, notwithstanding being ordered by the Pre-Hearing Officer to do so at the November 8<sup>th</sup> Pre-Hearing Conference. BellSouth also did not file the redacted pre-filed testimony of Milton McElroy by November 13, 2001 as ordered by the Pre-Hearing Officer on November 8<sup>th</sup>. (*OSS Docket* (Order Resolving Procedural Motions) (filed November 14, 2001) p. 22-23).

into totally mechanized, partially mechanized and manual. This further confirms that BellSouth has the state specific flow through information requested by AT&T. However, there is no indication either by AT&T or in BellSouth's publicly available *Monthly State Summary* of its wholesale performance that such flow through information is available or can be generated by the type of interface as requested by AT&T. Therefore, BellSouth is only required to provide the requested information by category but not broken down by the type of interface.<sup>13</sup>

The Pre-Hearing Officer concluded the *Order Resolving Procedural Motions* with the following ruling:

The Motion to Compel Discovery filed by AT&T and TCG is granted in part as to Interrogatory No. 36. BellSouth is ordered to provide no later than Tuesday, November 20, 2001 the achieved flow-through rate and the CLEC error excluded flow-through rate for each individual state in BellSouth's region and for the BellSouth region in total for the following categories: a) LNP; b) UNE; c) Business Resale; d) Residential Resale; and e) Total (*i.e.*, UNE, Business Resale, and Residential Resale combined).<sup>14</sup>

On November 16, 2001, BellSouth filed *Supplemental Responses to Interrogatories and Requests for Production*. In response to AT&T's supplemental interrogatory requesting that BellSouth "should either produce the requested data or explain why producing such data is not technically feasible,"<sup>15</sup> BellSouth stated that:

[it] has reviewed the Georgia Third Party Test, Florida Third Party Test Exceptions and Observations as well as the Georgia Third Party Test KPMG Consulting Flow-Through Evaluation Final Report. There is no mention of the state-specific reports or any questions about BellSouth's capability to produce State Specific Reports for Flow-through nor are there any exceptions or observations that addressed this issue . . . BellSouth's position remains the same. AT&T is misinformed on this issue. BellSouth has no record of an issue of state-specific reporting capability for Flow-Through Reports in the Flow-Through Evaluation (FT-1) conducted by KPMG in their OSS Evaluation for the Georgia Public Service Commission. Unless AT&T can identify the KPMG Exception or Observation as part of either the Georgia or Florida Third Party Test, or indicate where this capability is addressed in the Flow-Through Evaluation Final Report, BellSouth maintains that the Flow-Through Report is a regional report as indicated in the SQM . . . . If technical feasibility could be determined, the development effort to implement such a measurement would require considerable

<sup>13</sup> OSS Docket (*Order Resolving Procedural Motions*, pp. 24-25).

<sup>14</sup> OSS Docket at p. 27.

<sup>15</sup> OSS Docket (*Procedural Motions of AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc.*) (filed November 2, 2001) Attachment 1, p. 1. For the second time after November 8, 2001, BellSouth failed to address the question of whether it was technically infeasible to produce the requested information.

programming effort and it's [sic] associated costs.<sup>16</sup>

On November 20, 2001, BellSouth filed a *Motion to Clarify Order Regarding AT&T Interrogatory No. 36*. Again, notwithstanding the Pre-Hearing Officer's orders, BellSouth did not explain why producing the data requested in Interrogatory No. 36 was not technically feasible. Instead, BellSouth argued that "even if it were technically feasible to generate these reports, it is absolutely impossible to do so on one business day's notice."<sup>17</sup> BellSouth also contended that the portion of the *Order Resolving Procedural Motions* addressing Interrogatory No. 36 was inconsistent with the Pre-Hearing Officer's oral order at the Pre-Hearing Conference on November 8, 2001 and that under Tenn. R. Civ. P. 34 it was not required to create documents not already in existence.<sup>18</sup> BellSouth also asserted that it did not receive the November 14<sup>th</sup> *Order Resolving Procedural Motions* until November 16. On November 21, 2001, the Pre-Hearing Officer issued the *Order Denying Motion to Clarify and Compelling Discovery* requiring BellSouth to provide a response to Interrogatory No. 36 by November 29, 2001.

On November 29, 2001, one business day before the Hearing, BellSouth filed its *Second Supplemental Responses to Interrogatories and Requests for Production*, which stated in pertinent part:

The underlying data necessary to calculate such rates does exist, in some form, inasmuch as BellSouth retains information regarding LSRs submitted and information regarding those LSRs in its databases.

Since the data does exist in some form, with the appropriate programming work, time and expenditure, a program could be created that could extract such information on a state-by-state basis.

BellSouth has researched this matter, and has instructed its affected employees to determine what would be required in order to do such programming to respond to the subject data request. In response, those BellSouth employees have indicated that if the task were begun on November 30, 2001, it would take until the first

<sup>16</sup> OSS Docket (BellSouth's *Nonproprietary Supplemental Responses to Interrogatories and Requests for Production*, Supplemental Item No. 36 (filed November 16, 2001) p. 1).

<sup>17</sup> OSS Docket (*Motion to Clarify Order Regarding AT&T Interrogatory No. 36*) (November 20, 2001) p. 1.

<sup>18</sup> Notwithstanding BellSouth's reliance on Tenn. R. Civ. P. 34, which addresses Requests for Production of Documents, the discovery request at issue is an Interrogatory. Interrogatories are governed by Tenn. R. Civ. P. 33.

week in March, 2002, and at a substantial cost, to accomplish this task, a period of more than 90 days.<sup>19</sup>

With this language, BellSouth acknowledged, for the first time in this proceeding, that the requested data existed and could be provided.<sup>20</sup>

### **Hearing on the Merits (December 3-6, 2001)**

The Hearing in this proceeding commenced on Monday, December 3, 2001. The first issue addressed, preliminary to hearing evidence on the merits, was the unresolved issue of BellSouth's response to AT&T's Interrogatory No. 36. BellSouth presented testimony from several witnesses on the availability and amount of the time purportedly required to generate the flow-through information. These witnesses included Andrew James Saville, a BellSouth director of interconnection services specializing in the development and production of performance metrics and Ronald M. Pate, a BellSouth executive who has acted as an expert witness with regard to BellSouth's Operations Support System.<sup>21</sup>

Mr. Saville testified that BellSouth possessed an existing flow-through base that would have to be modified to produce the information at issue.<sup>22</sup> Mr. Saville testified that BellSouth has approximately 7,800 lines of code for flow-through but only some of the code would need to be rewritten to provide the flow-through information.<sup>23</sup> In his testimony, Mr. Saville referred to a chart that delineated the time he felt was necessary to complete the modifications. The chart indicated that the modifications would take ninety days, including twenty-five days for construction and twenty-nine days for testing.

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<sup>19</sup> *OSS Docket* (BellSouth's *Second Supplemental Responses to Interrogatories and Requests for Production*, Supplemental Item No. 36) (filed November 29, 2001) p. 2.

<sup>20</sup> Although BellSouth conceded on November 29, 2001 that the underlying data necessary to respond to Interrogatory No. 36 existed, BellSouth did not, before, on or after November 29, 2001, voluntarily commence the process necessary to provide the information.

<sup>21</sup> *OSS Docket* (Transcript of Hearing, December 3, 2001, p. 140).

<sup>22</sup> *Id.* p. 146.

<sup>23</sup> *Id.*



On December 3, 2001, after the record and the testimony were considered, BellSouth was ordered to provide the flow-through information not later than January 18, 2002.<sup>24</sup> This oral ruling was memorialized in the *Order on Procedural Matters* issued on December 31, 2001.

**BellSouth's Motion for Reconsideration**

On January 15, 2002, BellSouth filed a *Motion for Reconsideration* of the *Order on Procedural Matters*. BellSouth argued that the length of time it was given to produce the requested information was unreasonable and unsupported by the record. In effect, BellSouth argued that the Authority is required to base its decision solely upon the undisputed evidence it presented, without regard to the official record, any agency expertise or analysis of the evidence. According to BellSouth, because its witness Mr. Saville testified that the information could be provided no sooner than ninety (90) days, and no other evidence on the time needed to provide the information was admitted, the Authority was required to give BellSouth the full ninety (90) days from December 3, 2001 to provide the information.<sup>25</sup>

*BellSouth's Filing in Response to the Pre-Hearing Officer's Order Entered on December 31, 2001 in the Referenced Proceeding* was filed on January 18, 2002. Therein, BellSouth stated that it would file its response to Interrogatory No. 36 by the third week in February.

AT&T, TCG, SECCA and MCI Worldcom, Inc. ("MCI") jointly filed their *Opposition to BellSouth's Motion for Reconsideration of Hearing Officer's Order Regarding AT&T Interrogatory No. 36 of AT&T Communications of the South Central States, Inc., TCG MidSouth, Inc. Southeastern Competitive Carriers Association and MCI Worldcom, Inc.* (the "*Opposition*") on January 22, 2002. The *Opposition* responded that the forty-five (45) day deadline for filing the response to Interrogatory No. 36 was reasonable. The *Opposition* asserted that BellSouth

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<sup>24</sup> *Id.*, p. 195.

<sup>25</sup> *OSS Docket (Motion for Reconsideration of the Pre-Hearing Officer's Order Regarding Interrogatory No. 36)* (filed January 15, 2002) p. 10-12.

continued to justify its delay with evidence the TRA had already found not credible, rather than presenting details of its efforts to comply with the TRA's new discovery deadline.<sup>26</sup>

On January 25, 2002, the TRA issued an agenda for the February 5, 2002 Authority Conference, notifying the parties that this matter would be considered by the Directors at that Conference.

### **February 5, 2002 Authority Conference**

During their deliberations at the February 5, 2002 Authority Conference, the Directors considered the record in this case, including the Pre-Hearing Officer's Orders of November 8, 2001, November 14, 2001, and November 21, 2001, each of which ordered BellSouth to provide the information requested in Interrogatory No. 36.

When asked by the Authority why, given the aforementioned orders, BellSouth did not direct the relevant persons to begin work to respond to Interrogatory No. 36 before December 3, 2001, BellSouth responded:

The November 8<sup>th</sup> transcript shows – I think fairly read – that Director Greer said by November 13<sup>th</sup> either tell us that it's not technically feasible to do it or do it. I think that's what he said. And our position was then and is now that it was not technically feasible to get this done. If we had started on the date that we had gotten the original request from AT&T, which I believe was September 18<sup>th</sup>, September 17<sup>th</sup>, that we could not have gotten this done even if we had understood and thought that we were obligated to do it by the time of the hearing. It wasn't technically feasible to get it done within that time frame. And, indeed, that is what I believe is supported by the evidence that Mr. Saville gave when he appeared here in person.<sup>27</sup>

When asked, in effect, why BellSouth did not change its strategy of arguing that either it should not be required to provide the requested information, could not provide the requested

<sup>26</sup> See OSS Docket (Opposition to BellSouth's Motion for Reconsideration of Hearing Officer's Order Regarding AT&T Interrogatory No. 36 of AT&T Communications of the South Central States, Inc., TCG MidSouth, Inc. Southeastern Competitive Carriers Association and MCI Worldcom, Inc.) (filed January 23, 2002); see also Transcript from January 23, 2002 Authority Conference, pp. 14-24 (during which the agency extended the time for filing post-hearing briefs and proposed findings of fact and conclusions of law for seven (7) and twenty-one (21) business days, respectively, from the date BellSouth files the flow-through data.

<sup>27</sup> Transcript from February 5, 2002 Authority Conference, pp.34-35.

information or could not provide the information in a timely manner after the Pre-Hearing Officer ordered BellSouth to produce the information, BellSouth further responded:

Well, there's no question that on the 14<sup>th</sup> of November, the hearing officer said produce the information. But it was our – perhaps expectation is the wrong word. We thought we had the opportunity to say it's not technically feasible to produce it or to produce it.<sup>28</sup>

When asked whether it was BellSouth's position that it was not technically feasible to produce the information or that it was not technically feasible to produce the information within the time period as originally requested, BellSouth responded that it was not technically feasible to produce the information between September 17<sup>th</sup>, when the interrogatory was filed, and the December 3<sup>rd</sup> hearing date. BellSouth admitted, however, that it did not make known its position on the technical feasibility of the time period until its filing on November 29, 2001.<sup>29</sup>

The Authority then addressed the substance of BellSouth's *Motion for Reconsideration*. After extensive discussion and consideration of BellSouth's evidence at the December 3<sup>rd</sup> Hearing, a majority of the Directors<sup>30</sup> determined that BellSouth's evidence was not fully

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<sup>28</sup> *Id.*, pp. 35-36.

<sup>29</sup> *Id.*, pp. 37-38.

<sup>30</sup> Chairman Kyle did not vote with the majority. Chairman Kyle stated:

Commissioner Greer, you've worked really hard, and I know this has been a lot of your time and effort. And I thoroughly respect all that you have given to this particular docket. And I very cautiously ever try to veer away from a prehearing officer unless I have strong reason. What I think that I would like to see here is the information. What situation I do not want to get into is if the information is produced in a time shorter than Bell said they could produce it but would produce something and wouldn't certify it, then I would not have data that they could certify or vouch for. And that's exactly, Mr. Lackey, what you would be telling me; is that correct? Transcript from February 5, 2002 Authority Conference, pp. 40-41.

After BellSouth's counsel agreed, Chairman Kyle continued:

Well, let me just discuss this with you a minute. One, you could get the data in this shorter period of time and he might vouch for it. Number 2, he might say, well, you've given me a longer period of time but I need an extension and then I'll vouch for it. But is it his position that he will not vouch for this, or you-all, you being Bell, cannot certify this data in this shorter period of time? Transcript from February 5, 2002 Authority Conference, pp. 41-42.

After assuring that BellSouth would vouch for the information if permitted to file it during the third week in February, Chairman Kyle concluded, "I'm willing to go for the extra time. I don't think that that's not what has been said earlier. I want the information and it presented in a position that it can be certified. That's what I think that we need. I would be willing to give you that extra length of time." Transcript from February 5, 2002 Authority Conference, pp. 43.

credible and concluded that the action of the agency taken on December 3<sup>rd</sup> requiring BellSouth to file the response to Interrogatory No. 36 within the forty-five (45) day timeframe was reasonable and not arbitrary. The same majority determined that BellSouth, through a strategy of repeated maneuvers to avoid production through delay and evasiveness, had failed to produce the information as ordered on several occasions. After noting the impropriety of BellSouth's strategies of refusing to comply with lawful orders and continuing to argue its position after orders on the matter had issued, the same majority denied BellSouth's *Motion for Reconsideration*. During the February 5<sup>th</sup> Conference, a majority of the Directors scheduled a hearing on February 20, 2002 for the purpose of determining whether to subject BellSouth to a penalty, pursuant to Tenn. Code Ann. § 65-4-120, for failing to comply with lawful orders of the Authority.

On February 5, 2002, the Authority issued a *Notice of Complaint and Hearing* reflecting the above mentioned findings and memorializing the date of the Hearing. The *Notice* directed the parties to file briefs addressing the issue of imposing a penalty upon BellSouth pursuant to Tenn. Code Ann. § 65-4-120.

On February 13, 2002, BellSouth filed a *Brief Regarding Imposition of Penalty Pursuant to Tenn. Code Ann. § 65-4-120*. BellSouth argued that it should not be sanctioned for its inability to respond to Interrogatory No. 36 in forty-five (45) days. BellSouth contended that the order requiring it to produce the information within that time period lacked an evidentiary basis and was unreasonable and an abuse of discretion. BellSouth also argued that the Authority lacked jurisdiction to impose sanctions under Tenn. Code Ann. § 65-4-120 for violations of orders requesting information and that, in any event, Tenn. Code Ann. § 65-4-120 has no application to orders issued by Pre-Hearing Officers.

On February 13, 2002, AT&T TCG and SECCA filed the *Intervenors' Brief on Sanctions Against BellSouth for Failing to Comply with Lawful Orders*. AT&T, TCG and SECCA urged the Authority to strike all of BellSouth's evidence on the regionality of its ordering OSS, prohibit BellSouth from contesting the reasonableness of AT&T's Exhibit 8, which was intended as a surrogate for the state-specific flow-through rates on ordering requested in Interrogatory No. 36, and/or impose a substantial monetary penalty.

### **February 20, 2002 Hearing**

On February 20, 2002, the Directors convened a Hearing to consider imposing sanctions against BellSouth pursuant to Tenn. Code Ann. § 65-4-120. The parties in attendance at the February 20, 2002 Hearing included Guy M. Hicks, Esq. and R. Douglas Lackey, Esq., representing BellSouth, Michael A. Hopkins, Esq., representing AT&T, and Henry Walker, Esq., representing SECCA and MCImetro.

Director Greer gave a preliminary statement detailing BellSouth's actions in conducting discovery in this docket. He observed:

We are here, first and foremost, because BellSouth has not been forthcoming and has not acted in the spirit of cooperation. If BellSouth had simply objected to Interrogatory No. 36 in a timely manner, as ordered, and if BellSouth had timely informed me about the existence of flow-through information and the amount of time it would take to produce the requested information, we may not be here today.<sup>31</sup>

Director Greer then stated that if the Authority determines that BellSouth's actions warrant a penalty, the Authority should then consider whether BellSouth exhibited good faith under Tenn. Code Ann. § 65-4-116, which specifically states:

[i]n determining the amount of the penalty, the appropriateness of the penalty to the size of the business of the person, firm or corporation charged, the gravity of

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<sup>31</sup> OSS Docket (Transcript of February 20, 2002 Hearing, p. 11).

the violation, and the good faith of the of the person, firm or corporation charged in attempting to achieve compliance after notification of a violation shall be considered.”<sup>32</sup>

The Directors then heard the argument of the parties. BellSouth denied that it acted intentionally, apologized to the extent that its actions seemed intentional and argued that Tenn. Code Ann. § 4-5-311 prohibited the TRA from imposing sanctions in this case.<sup>33</sup> AT&T argued that Tenn. Code Ann. § 65-4-120 authorized sanctions and reiterated its belief that the information it seeks is very important to this case.<sup>34</sup> SECCA argued that Tenn. Code Ann. § 65-4-120 authorized the imposition of sanctions.<sup>35</sup> The Hearing then concluded.

On February 21, 2002, BellSouth filed its response to Interrogatory No. 36. The parties filed their Post-Hearing Briefs on March 1, 2002. The Post-Hearing Brief of AT&T, TCG, and SECCA included an analysis of the response to Interrogatory No. 36.<sup>36</sup>

On March 6, 2002, AT&T, TCG and SECCA filed a *Motion to Make Response to Discovery Part of the Evidentiary Record*, requesting that BellSouth’s response to Interrogatory No. 36 be entered into evidence. The Motion stated that BellSouth did not oppose the admission of its response to Interrogatory No. 36 into the evidentiary record. BellSouth did not file a response to the Motion.

The parties filed their *Proposed Findings of Fact and Conclusions of Law* on March 15, 2002. The *Proposed Findings of Fact and Conclusions of Law* filed by AT&T, TCG and SECCA rely in part on BellSouth’s response to Interrogatory No. 36.<sup>37</sup>

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<sup>32</sup> *Id.*, p. 9 (quoting Tenn. Code Ann. § 65-4-116).

<sup>33</sup> *Id.*, pp. 21-22.

<sup>34</sup> *Id.*, pp. 25, 29.

<sup>35</sup> *Id.*, p. 26-28.

<sup>36</sup> See OSS Docket (Phase I Post-Hearing Brief AT&T Communications of the South Central States, Inc., TCG MidSouth, Inc. and the Southeastern Competitive Carriers Association) (filed March 1, 2002) pp. 28-30.

<sup>37</sup> See OSS Docket (Phase I Proposed Findings of Fact and Conclusions of Law of AT&T Communications of the South Central States, Inc., TCG MidSouth, Inc. and the Southeastern Competitive Carriers Association) (filed March 15, 2002) ¶ 22.

### **March 26, 2002 Authority Conference**

At a regularly scheduled Authority Conference held on March 26, 2002, the Authority deliberated upon the *Motion to Make Response to Discovery Part of Evidentiary Record* filed by AT&T, TCG and SECCA on March 6, 2002. The Motion sought to make BellSouth's response to Interrogatory No. 36 part of the evidentiary record. After determining that BellSouth had no objection to the Motion and obtaining each party's express waiver of its right to interrogate, cross-examine and impeach the source of the information contained in BellSouth's response to Interrogatory No. 36 in Phase I of this proceeding, the Directors unanimously voted to grant the *Motion to Make Response to Discovery Part of Evidentiary Record*.<sup>38</sup> The Authority issued a written order memorializing this ruling on May 13, 2002.

### **June 11, 2002 Authority Conference**

During the regularly scheduled Authority Conference held on June 11, 2002, the Authority deliberated on the issue of whether to impose sanctions upon BellSouth for its failure to comply with the discovery orders and rulings of this agency requiring BellSouth to respond to Interrogatory No. 36. A majority of the Directors were persuaded, after reviewing the record, that BellSouth repeatedly displayed an intention to delay production of the information requested in Interrogatory No. 36.<sup>39</sup> The same majority found that the record showed that BellSouth's professed reasons for not producing the information in a timely manner changed over the course

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<sup>38</sup> See Transcript of March 26, 2002 Authority Conference, pp. 16-18; see *Consumer Advocate v. TRA and United Cities Gas Co.*, No. 01-A-01-9606-BC-00286, 1997 WL 92079 at \* 3 (Tenn. Ct. App. March 5, 1997) (The parties reserved their right to interrogate, cross-examine and impeach the source of the information contained in BellSouth's response to Interrogatory No. 36 in Phase II of this proceeding.).

<sup>39</sup> Chairman Kyle did not vote with the majority. She reasoned, I believe that sanctions are most prevalent on discovery issues. Bell was not flaunting the authority or the jurisdiction of this court. But in all I have found, with my experience as a litigator, when I practiced in the courtroom, courts don't sanction unless there is a chronic problem. This was an isolated incident. It's time to go on. And I encourage Bell and others to keep this an isolated incident. This does not merit sanctions. The courts use sanctions to prevent chronic abuses of the discovery process. Here, I find Bell not to be in a chronic abusive situation; therefore, I'm not voting for any type of sanctions.

of these proceedings, thereby creating a moving target.<sup>40</sup> The majority observed that even as late as the November 21, 2001 Order, BellSouth had not explained why producing the information was not technically feasible. Further, the record shows that before the December 3, 2002 Hearing, BellSouth had not directed any of its employees to begin producing the information.

Accordingly, a majority of the Directors determined to penalize BellSouth in the amount of one thousand and fifty dollars (\$1,050.00).<sup>41</sup> This amount was calculated pursuant to Tenn. Code Ann. § 65-4-120<sup>42</sup> at the rate of fifty dollars (\$50) per day, from January 18, 2002, the final deadline for BellSouth to respond to Interrogatory No. 36 as ordered by the Authority, until to February 21, 2002, the date on which BellSouth actually provided its response.

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<sup>40</sup> The same majority determined that the record clearly reflects that BellSouth's initial claims with respect to the technical feasibility concerned a technical inability to provide the information, as opposed to an issue of the timing of its provision of the information. See Transcript from February 5, 2002 Authority Conference, p. 34-36. BellSouth employed a mutable definition of the term "technical feasibility" in these proceedings, at times questioning whether it possessed the technology to provide the information and other times asserting that it could not provide the information prior to the December 3<sup>rd</sup> Hearing date. See Transcript from February 5, 2002 Authority Conference, p. 34-36; Cf. (*OSS Docket (BellSouth's Second Supplemental Response* (filed November 29, 2001) p. 2, ¶ 5); (*BellSouth's Non-Proprietary Supplemental Responses to Interrogatories and Requests for Production Propounded by the CLECs, Supplemental Item No. 36* (filed November 16, 2001) p. 17); (*OSS Docket (Motion to Clarify Order Regarding AT&T Interrogatory No. 36)* (filed November 20, 2001) p. 1).

<sup>41</sup> Chairman Kyle did not vote with the majority.

<sup>42</sup> In imposing the penalty, the majority rejected BellSouth's contention that Tenn. Code Ann. § 4-5-311(b) prohibits the TRA from imposing sanctions pursuant to Tenn. Code Ann. § 65-4-120. Tenn. Code Ann. § 4-5-311(b) states in pertinent part "In case of disobedience to any subpoena issued and served under this section or to any lawful agency requirement for information, or of the refusal of any person to testify in any matter regarding which such person may be interrogated lawfully in a proceeding before an agency, the agency may apply to the circuit or chancery court of the county of such person's residence, or to any judge or chancellor thereof, for an order to compel compliance with the subpoena or the furnishing of information or the giving of testimony." By its plain language, Tenn. Code Ann. § 4-5-311(b) is discretionary. Further, the purpose of Tenn. Code Ann. § 4-5-311(b) is to provide state agencies with information they have unsuccessfully requested. Because BellSouth ultimately agreed to provide the information requested, resort to Tenn. Code Ann. § 4-5-311(b) was unnecessary. Moreover, the request for information originated from discovery requests between the parties to this action, not from the Authority. The Authority's orders requiring BellSouth to respond to Interrogatory No. 36 arose in the context of resolving the Motion to Compel Discovery filed by AT&T and TCG. The Authority's Rules state that when attempts to achieve discovery informally fail, "discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure." Tenn. Comp. R. & Reg. 1220-1-2-.11(1). The Authority's disposition of the Motion to Compel Discovery was consistent with Tenn. Comp. R. & Reg. 1220-1-2-.11(1) and Tenn. R. Civ. P. 37. BellSouth's contention that Tenn. Code Ann. § 4-5-311(b) governs because it is a more specific statute than Tenn. Code Ann. § 65-4-120 lacks merit. Tenn. Code Ann. § 4-5-311(b) is a more general procedural statute that applies to state government in general, whereas Tenn. Code Ann. § 65-4-120 specifically empowers the TRA to seek penalties for violations of its orders and rulings.



Further, a majority of the Directors admonished BellSouth that good faith is expected before the Authority with regard to discovery matters.<sup>43</sup> According to the same majority, the admonition is warranted by the evasive nature of BellSouth's explanations for its failure to timely respond to Interrogatory No. 36, that not only changed throughout these proceedings, but resulted in more than a few orders compelling the discovery response.<sup>44</sup> The same majority determined that BellSouth's failure to timely produce the requested information also warranted the admonition.

**IT IS THEREFORE ORDERED THAT:**

1. Pursuant to Tenn. Code Ann. § 65-4-120, BellSouth is penalized for its repeated failure to conform its conduct to the Tennessee Rules of Civil Procedure, the TRA Rules and the lawful orders of this agency as referenced herein in the amount of one thousand fifty dollars (\$1,050). The penalty is in the amount of fifty dollars (\$50) per day, from January 18, 2002, the deadline for BellSouth to respond to Interrogatory No. 36 as ordered by the Authority until February 21, 2002, the date on which BellSouth provided its response to Interrogatory No. 36.
2. BellSouth shall immediately remit a payment in the amount of one thousand fifty dollars (\$1,050) to the Office of the Executive Secretary of the TRA.
3. BellSouth is hereby admonished that good faith is expected in its conduct of matters before this agency.

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<sup>43</sup> Chairman Kyle did not vote with the majority.

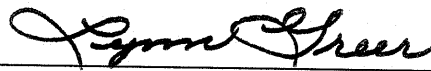
<sup>44</sup> It was not until November 29<sup>th</sup>, the last business day before the December 3<sup>rd</sup> Hearing, that BellSouth asserted that there was insufficient time to produce the information prior to the hearing, a fact which prevented the Pre-Hearing Officer from considering the option of postponing the hearing until the information was produced. In its *Motion to Clarify Order Regarding AT&T Interrogatory No. 36*, filed November 20<sup>th</sup>, BellSouth was still evading the question of whether the information was obtainable, arguing "even if it were technically feasible to generate these reports, it is absolutely impossible to do so on one business day's notice." (*OSS Docket (Motion to Clarify Order Regarding AT&T Interrogatory No. 36)* (filed November 20, 2001) p. 1). The record shows that BellSouth had notice of this issue on September 18, 2001 and did not file an objection thereto.

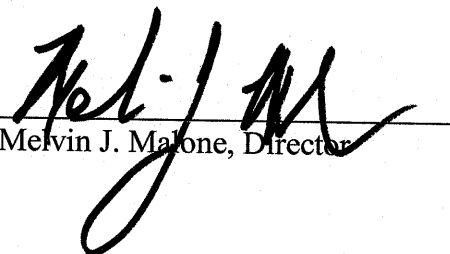
4. Any party aggrieved by this Order may file a Petition for Reconsideration with the Tennessee Regulatory Authority pursuant to Tenn. Code Ann. § 4-5-317 within fifteen (15) days of the entry of this Order.

5. Any party aggrieved by the Authority's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

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Sara Kyle, Chairman

  
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H. Lynn Greer, Jr., Director

  
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Melvin J. Malone, Director

ATTEST:

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K. David Waddell, Executive Secretary

<sup>45</sup> Chairman Kyle did not vote with the majority.